

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,
Employer

and

Case 13-RC-121359

COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),
Petitioner

BRIEF, AMICUS CURIAE, OF ELLEN DANNIN, ATTORNEY, IN SUPPORT OF
THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD

SUMMARY

The Northwestern University litigation shows that this is a simple case in which the employer has tried – at great length – to make complex by, for example, arguing that the football players are not employees under the common law and statutes other than the National Labor Relations Act control.

On the only question that matters – whether the Northwestern football players are employees as defined by the NLRA – the answer is clear. The law, facts, and policy amply support a finding that all of the players on the team are employees, as defined by the National Labor Relations Act (NLRA), without regard to whether they receive athletic scholarships or not and whether they are walk-ons or not. Walk-ons and players who do or do not get scholarships but who work out with the team and provide valuable support for the team during practice and games are also employees under the NLRA.

The default position of the National Labor Relations Act – and its policies – on the definition of who is an employee is clearly for employee status. A party seeking to exclude an employee from the coverage of the National Labor Relations Act bears the burden of demonstrating a justification for the exclusion. In other words, it is – the Employer's burden in this case to prove that the Northwestern University football players were not employees under § 2(3) of the NLRA. This, the employer has failed to do.

The Northwestern University Football Players Are Employees under the National Labor Relations Act

The Supreme Court observed in *N.L.R.B. v. Town & Country Electric*, 516 U.S. 85 (1995), that the NLRA's definition of who is an employee includes "the common law agency doctrine of the

conventional master-servant relationship . . . [which] exists when a servant performs services for another, under the other's control or right of control, and in return for payment."

In other words, the master and servant relationship includes features that intersect with the NLRA's definition of employee. However, the words of the NLRA's definition of employee is far broader than the master and servant doctrine. That breadth is intentional. Congress found that, the common law definition of master and servant was inadequate to promote Congress's declared purposes and policies that govern the NLRA.

The National Labor Relations Act must be interpreted with attention to the law and the policies Congress has identified. However, in this case, the employer has often relied on definitions of employee other than the NLRA's definition, and, where it might need some guidance, it has failed to turn to the NLRA's stated policies. Had it done so, it would find that Section 1 of the NLRA declares the policy of the United States to include "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 2(3) of the NLRA defines employee status expansively as including any employee and not limited to the employees of a particular employer, unless the Act explicitly states otherwise . . .". Congress did not use this broad definition of employee casually. The *Legislative History of the National Labor Relations Act* shows that, as early as March 1, 1934, language strikingly similar to the NLRA's current broad definition of employee was under discussion by the Senate: "Wherever the term 'employee' is used it shall not be limited to mean the employee of a particular employer, but shall embrace any employee, unless the Act explicitly states otherwise." (p.2) By May 10, 1934, the basic definition of employee in the Senate's bill was strikingly similar to the current language. (p.1085)

The language of the House bill differed, but its March 1, 1934 version included language similar to the Senate in its last line: "Wherever the term 'employee' is used, it shall not be limited to mean the employee of a particular employer, but shall embrace any employee, unless the Act explicitly states otherwise." (p.1129) By February 26, 1935, the House and Senate versions had come close to the definition we see today. (p.2445)

The Senate's Analysis of the Bill explains the importance of that definition to the goals of the NLRA's operation.

The term "employee" is not limited to the employees of a particular employer. The reasons for this are as follows: Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend beyond the limits of a single employer unit. These organizations at times make agreements or bargain collectively with employers, or with an association of

employers. Through such business dealings, employees are at times brought into an economic relationship with employers who are not their employers. In the course of this relationship, controversies involving unfair labor practices may arise. *If this bill did not permit the Government to exercise complete jurisdiction over such controversies (arising from unfair labor practices), the Government would be rendered partially powerless, and could not act to promote peace in those very wide-spread controversies where the establishment of peace is most essential to the public welfare.* (p.2305) (emphasis added).

In other words, the definition of employee that would become part of the NLRA was used in order to ensure that employees would be protected when they took actions in concert, that is, took collective action, with other employees.

Section 2(3) Must Be Read Together with Sections 2(2) and 2(9)

To promote the NLRA's operation as Congress intended, the definitions of "labor organization" – § 2(5), "employer" § 2(2), "employee" § 2(3), and "supervisor" § 2(9) must be read together in order to know whether a worker is protected by the NLRA.

For example, § 2(3) must be read with an eye to the NLRA's definition of "labor dispute" in § 2(9), because it too has a specialized meaning other than our normal definition of a dispute. Section 2(9) defines a labor dispute as actions such as collective bargaining and determining who will represent employees and how they will be represented. Section § 2(9) is drafted to meet the breadth of the definition of employee in order to promote the policies set out in § 1 – organizing, bargaining, encouraging the friendly adjustment of disputes as to wages, hours and other working conditions in order to restore equality of bargaining power between employees and employers.

Understanding these actions as part of the normal operation of the NLRA requires respecting the NLRA's specialized meaning of employee as broader than an employer-employee relationship. Section 2(9) says that employees are protected across a wide range of actions, including "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment."

The employer in this case has tried to avoid applying these sections. Instead, it has argued that statutes other than the NLRA apply or that the common law definition of employee must be used. In each case, the employer substitutes definitions that would find the football players not to be employees.

Section 2(9) makes it abundantly clear that the common law definition of employee – or, indeed, definitions of employee from other statutes – would strip away the basic rights Congress provided under the NLRA, including editing out key language that protects employees "regardless of whether the disputants stand in the proximate relation of employer and employee."

The importance of applying the NLRA's policies and definitions – and not the definitions of employee in laws other than the NLRA – is underscored by the employee rights set out in § 7:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

These are rights not tethered to a common law master and servant legal regime.

The *Brown* Majority Decision Is Not Based on NLRA Law and Policies and, Therefore, Should not be Applied

The Board majority in *Brown University*, 342 NLRB 483 (2004), written by Chairman Battista, held that, “as a matter of policy,” graduate students at private universities have no right to union representation. Chairman Battista took an expansive position in that case when he held that it is not possible to be both a graduate student and an employee of the university the student attends. According to Chairman Battista, “Based on all of the above-statutory and policy considerations, we concluded that the graduate student assistants are not employees within the meaning of Section 2(3) of the Act. Accordingly, we decline to extend collective bargaining rights to them, and we dismiss the petition.” 342 NLRB 483, 490 (2004).

However, the Board has never had the legal authority to issue such a broad decision, especially a decision unsupported by any NLRA policy or law. In fact, not only does the National Labor Relations Act not give the Board power to make policy decisions in representation cases, but § 9(b) affirmatively says the opposite. Section 9(b) says that the NLRB must decide who is an employee, eligible to vote on collective bargaining, *based on the facts “in each case”*.

In other words, the case before the Board in *Brown* could not be a case about the status of all graduate students at all private sector universities and colleges everywhere, let alone all university and college students. The employee status of Brown graduate students could only be determined based on facts that show whether the Brown graduate students were employees of Brown University.

Even if it had the legal authority to make a “policy” decision, the *Brown* Board majority identified no policy it relied on. Certainly, merely proclaiming, in general terms, that a decision was being made “as a matter of policy” is insufficient under the law to support such a broad ruling, one that the *Brown* majority asserted was to be applied to graduate students at private universities and colleges everywhere.

Indeed, none of the NLRA's policies would support the *Brown* majority's unguided and arbitrary conclusion. The NLRA's policies include "encouraging the practice and procedure of collective bargaining" and protecting workers' rights to self-organization and designating "representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Member Battista's Opinion in *Brown* Is in a Long Tradition of Limiting NLRA Rights

The National Labor Relations Act cannot be understood outside its historical context, because today's NLRA is the result of judicial "amendments" that have weakened the rights Congress included in the NLRA through unrooted "interpretation."

In recent years, a number of scholars have carefully examined the "judicial amendment" of the NLRA, including James B. Atleson, *Values and Assumptions in American Labor Law* (1983); Charles O. Gregory, *Labor and the Law* (2d ed. 1958); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 Minn. L. Rev. 265 (1978); and Ellen Dannin, *Taking Back the Workers' Law – How to Fight the Assault on Labor Rights* (2006) and *Hoffman Plastics as Labor Law – Equality at Last for Immigrant Workers?* (Symposium on The Evolving Definition of the Immigrant Worker: The Intersection Between Employment, Labor, and Human Rights Law), 44 U. S.F. L. Rev. 393 (2009).

The process of "judicially amending" labor laws is a long and highly effective one, as these studies show. While the NLRA was being debated, "Attorney Osmund K. Frankel observed that judges had 'amended' earlier labor laws by declaring that a statute merely embodied the common law; that the legislature had no authority to take away power inherent in judges; and that any other interpretations would be unconstitutional. (*Hoffman Plastics*, at 305.) Those processes continue today and can be seen in the employer's arguments in this case, when it claims that the definition of "employer" or "employee" is that of workplace laws other than the NLRA and when it claims that the NLRA's definition of employee can be "administratively amended" by allowing a majority of an administrative agency to declare it has the power to take such an action.

The *Brown* Majority Failed to Consider the NLRB's Longstanding Dual-Function Doctrine

Another flaw in the *Brown* majority decision – and one that affects this case – is the employer's claim that the graduate students' status as students of the university precluded their also having an employer-employee relationship with the university. In fact, the Board's dual-function employee doctrine has long been recognized as applying in this sort of case, and dual-function employees have the right to vote for and be represented by unions.

As the NLRB's *Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings*, at 122-123, explains,

Dual function employees are those who perform more than one function for the

same employer. Dual function employees who spend part of their work time performing bargaining unit work may share a sufficient community of interest with the unit to be eligible to vote, even though they do not spend a majority of their time performing unit work. The same community of interest tests are applied to dual function employees as are applied to regular part-time employees.

The *Brown* Majority and Northwestern University Have Failed to Recognize that Not Paying Student Employees is a Violation of the Fair Labor Standards Act Rather than Evidence Relevant to Employee Status Under the National Labor Relations Act

The employer's position in the Northwestern University case and the decision in *Brown* have argued for odd conclusions that are not grounded in the NLRA. For example, the *Brown* majority held that paying graduate student employees an amount lower than minimum wage for their hours as teachers and researchers meant that the money must be a student stipend and not pay for work.

However, a more accurate view of the employers' actions is that not paying at least minimum wage – and certainly paying nothing – is evidence that the employers have violated the Fair Labor Standards Act and, in the case of Northwestern, potentially violated the Illinois Wage Payment and Collection Act.

<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2402&ChapterID=68>.

Had *Brown* been analyzed, based on its facts and the law, and not, as an unguided policy decision, the graduate students would most likely have been found to be employees based on the facts of the case. Instead, the Board's majority decision in *Brown* reads as if not being an employee was the default position and as if the burden should be placed on the party trying to prove that someone is an employee.

That is not a correct analysis.

Section 2(3) defines employee to include "any employee," whether or not an employee of an employer. That is, the NLRA's definition of employee includes even situations that are outside an "economic relationship."

In other words, employee status is the default position. The NLRB's definition of "employee" in § 2(3) was broadly worded so that most private sector workers would be found to be employees and protected by the NLRA. The party trying to show that a worker is not an employee has the greater burden. In addition, § 2(3)'s language shows that the status of employee is not based solely on an employer-employee relationship.

All of the Northwestern Football Players Are Employees as Defined by the NLRA

In order to make each employment and labor law effective, the definitions of employee and

employer must be defined so as to promote the specific purposes and policies of each law. In other words, there can be no generic or uniform definition of employee across legal regimes.

For example, jurisdiction under the Employee Polygraph Protection Act, 29 U.S.C. § 2001(2) is based on both conventional employer and employee status but also protects “prospective” employees: “The term ‘employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. Why does the EPPA define its jurisdiction to include prospective employees? It does so because lie detectors are so often used in making hiring decisions that may injure a prospective employee as a result of a polygraph test.

Title VII defines “employee” simply as “an individual employed by an employer” and then lists those who are excluded from employee status, and, as a result, excluded from Title VII’s protections. Meanwhile, the Americans with Disabilities Act bases its jurisdiction on discrimination based on disability and on being regarded as having a disability. 42 U.S.C. § 12111.

The Fair Labor Standards Act, which enforces minimum wage, overtime, and child labor laws, 29 U.S.C. §§ 206, 207, 212, defines employer in § 203(d) as “any person acting directly or indirectly in the interest of an employer in relation to an employee” and defines employee simply as “any individual employed by an employer” § 203(e)(1). However, key to the FLSA’s enforcement of violations – and unique compared with other employment laws – is its definition of “to employ” as “to suffer or permit to work.” § 203(g). In other words, an employer can violate the FLSA without actually ordering an employee to perform work. The FLSA can be violated merely by an employer’s passively allowing work to be performed.

These FLSA definitions may apply to the situation of the NWU football players, if what they are doing is work for an employer. If Northwestern puts the players in a situation in which they are permitted to do work, then Northwestern has suffered or permitted the players to work. If the players are performing work and have not been paid at least minimum wage and overtime, then Northwestern will have violated the FLSA. In essence, the employer attempts to construct a plausible claim that what the Northwestern football players do is not work, and the money they receive is not pay for work.

Northwestern’s firmly held position in this case is that their scholarships are not pay, and, as a result, it has not paid wages to the players nor have the players done work for an employer. Northwestern attempts to reinforce its position by actions such as not having FICA taxes withheld from the players’ scholarship money and not issuing football scholarship recipients with W-2 tax forms. (DDE p.3).

However, this logic and use of IRS forms is backwards and even totemic in its investing so much significance in whether a government form is issued. The starting point ought to be whether the players are receiving income. The second issue is whether what the football players are doing is

work for the university.

The employer's brief focuses on discrete pieces of the various categories of players' duties and the terms under which they work, rather than examining what the individual players do when participating as a team. In fact, what the employer asks the NLRB to overlook is the obvious – that football is a team sport. As a team sport, it depends on the efforts of all members of the team, hour after hour. In fact, the majority of what the team members do takes place during practice rather than during the few minutes of a few football games.

The hearing testimony described in detail the ways in which the activities of the nonscholarship members participate in promoting the success of the team. For example, team members who never take the field in a game play important roles in workouts and in other ways. They are available to practice and support the development of all the players. The bottom line is that the star players could not perform at their best without the contributions made by the players who never take the field during a game but who are on the field and at mandatory reviews of past games and formation of strategies for hours each week as the team prepares for its next game.

If people were less dazzled by school spirit and by football in general, they would see that what the teams players do is work, without regard to whether they are paid and whether they ever play in a game.

The employer's Request for Review of Decision and Direction of Election is full of misleading and irrelevant arguments. For example, on page 12, the employer contends, "The Regional Director also found irrelevant the uncontested fact that athletic scholarships are not treated as compensation for tax purposes." As discussed earlier, this argument is a distraction that ignores the NLRA – the only law that matters in this case.

On page 17, the employer puts things backward. The issue is not that the scholarships are not treated as wages, but, rather, the extent to which the employer has failed to meet its obligations under state and federal tax codes and wage payment laws. Also on page 17, the employer argues that the walk-ons do not meet the definition of employee because they do not receive compensation for the athletic services that they perform and, in addition, unlike the scholarship players, the walk-ons do not enter into any type of employment contract with Northwestern University.

None of these things is required in order to be an employee protected by the NLRA. The employer's not paying workers in compliance with the Fair Labor Standards Act does not show that what they do is not work, nor does it mean that what they do is not work for their employer. Indeed, failure to pay is not evidence of a lack of employee status. It may simply mean that the employer is violating the Fair Labor Standards Act. How stipends, scholarships, and grants are paid, how they are costed out over hours worked, and whether minimum wage requirements are being met are problems that the Department of Labor has dealt with repeatedly over the years.

Northwestern takes the position that the walk-ons cannot be employees because they have different terms of employment than the scholarship players' terms. None of that matters. What matters are the facts as to how the football players perform their duties. In this case, those terms are more similar than not regardless of whether a player receives a generous scholarship or no scholarship and whether a player takes the field in a game or not. They all work hard and work under the basic rules that all the players must abide by.

The walk-ons are not mere bystanders. They participate actively in the practice and drills, and their active presence provides depth and experience to the team. That the walk-ons have slightly different conditions than the scholarship players has no relevance to whether they are employees. The key issue is whether the employer has the right to control. The record in the case makes it abundantly clear that they are employees of Northwestern who perform functions that are of great importance to students, alumni, and the university.

In short, there is no legal basis for holding that awarding a scholarship or not awarding a scholarship to a football player has any effect on whether a player is an employee as defined by the NLRA. In fact the walk-ons may feel even more pressure than the scholarship players to show that they make valuable contributions.

A Community of Interest Exists among All the Football Players

At its most basic, the activities engaged in by the football players when playing and practicing create a community of interest among the football players, regardless of whether they are scholarship players or walk-ons. The activities of all the football players throughout each day – when school is in session and when it is not – are overseen and managed by the coaches.

In fact, the football players live in two worlds during their school years. One is the world they inhabit that focuses single mindedly on football nearly every hour of each day. The other is the world of their academic studies. Those dual roles – and the intensity and investment the players must make – are not equal.

The evidence shows that, when there is a conflict between school work and football, football activities tend to trump the academic work. The record shows that the pressure of practice and following the rules that control the football players means they cannot take courses they would like to take or that they need to take for a certain major if the course conflicts with football obligations.

All these constrictions the football players experience are far greater than those of the average worker. The employer here not only has the right to control, it exercises pervasive control.

The Football Players Perform Work for an Employer

The NLRB found that Northwestern received benefits from the business of football beyond the joy of sport and winning. (p.14) The team had an immeasurably positive effect on Northwestern's reputation and finances, including increasing alumni giving and the number of

applicants to the University. In other words, by doing well the football program gives the university a high return on its investment in the football team.

At the same time, the hearing records shows that all football team members are subject to a high degree of control that far exceed the evidence generally required to show an employer-employee relationship. (p.16)

The players have restrictions placed on them and/or have to obtain permission from the coaches before they can: (1) make their living arrangements; (2) apply for outside employment; (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; and (8) engage in gambling. The fact that some of these rules are put in place to protect the players and the Employer from running afoul of NCAA rules does not detract from the amount of control the coaches exert over the players' daily lives.

In this case, abundant evidence shows that what the players do can only legitimately be described as work for an employer and that their employer is Northwestern University. The best evidence of Northwestern's employer status is that the degree of control it can exercise over the players includes requiring the football players to leave home on Christmas morning in order to be ready to play in a bowl game.

Conclusion

Northwestern University has tried to bootstrap its claim that it has not paid wages to the football players into evidence that the football players are not employees under the National Labor Relations Act. The problem for the employer is that its definition of employee and the meaning of "to employ" differ substantially from the NLRA's definition of who is an employee, who is an employer, who is a supervisor, and what is a labor organization. In order to make a decision about employee status, the NLRA's definition is the only definition that matters in a case governed by the National Labor Relations Act.

Applying the NLRA to the facts amply demonstrates that all the football players are employees.

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